STATE OF MICHIGAN

COURT OF APPEALS

LASHAUNDA GRAVES,

Plaintiff-Appellant,

v

STATE FARM MUTUAL INSURANCE COMPANY and JAMI LESSARD,

Defendants-Appellees.

UNPUBLISHED
February 25, 2010

No. 289822
Oakland Circuit Court
LC No. 2008-093745-CK

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to both defendants. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In October 2007, plaintiff was injured in an automobile accident involving two vehicles. The vehicle plaintiff was driving was owned and insured through defendant State Farm by plaintiff's mother; the other was owned by defendant Lessard and insured through Bristol West, but was driven by an unidentified driver. Although Bristol West initially denied Lessard's claim for the vehicle based on its assertion that Lessard had not proven it was stolen, when plaintiff's mother sought to recoup her collision deductible from Bristol West, her claim was denied for the reason that the vehicle *was* stolen. Bristol West also denied liability for plaintiff's injuries. However, according to State Farm, plaintiff's mother informed its agent in November 2007 that Lessard's vehicle had not been stolen and the driver was known to Lessard. This was contrary to the information plaintiff gave to the police at the time of the accident.

Plaintiff filed a claim with State Farm for uninsured motorist benefits, but in May 2008, State Farm sent plaintiff's counsel a letter denying her claim, stating, "Bristol West denied coverage to their insured's vehicle, but did not deny the liability. Bristol West remains liable for damages sustained by others involved in the accident." However, on May 30, 2008, Bristol West communicated to State Farm that it was denying plaintiff's claim because Lessard continued to maintain that the vehicle was stolen and no one had ever identified the driver. Because of the conflicting information it received, State Farm informed plaintiff's attorney it was reviewing the denial and considering requesting plaintiff and her mother to submit to an examination under oath (EUO). Under the policy plaintiff's mother had with State Farm, anyone insured or otherwise claiming uninsured motorist benefits "must, at our option, submit to an examination

under oath, provide a statement under oath, or do both, as reasonably often as we require." State Farm attempted to schedule the EUO in July 2008, but was informed by plaintiff's counsel that they were unwilling to submit to an EUO, and would be filing suit instead.

Plaintiff filed her complaint in August 2008, alleging that Lessard's vehicle was stolen and that State Farm was wrongly denying her claim. Although Lessard was named as a defendant, the complaint contained no allegations that she was liable in any way. Both defendants moved for summary disposition, State Farm expressly alleging that plaintiff failed to cooperate as required by the policy. At the hearing on the motions, the trial court first found that Lessard's affidavit stating her vehicle had been stolen sufficiently established that, under MCL 257.401,[1] she was not liable. Plaintiff's claim against her was dismissed with prejudice.

The court found that plaintiff had not met the requirements of State Farm's policy and that case law dictated her complaint must be dismissed. The policy language was not contradictory, and plaintiff was not excused from complying with the request just because State Farm had initially denied her claim. Requiring an insured to submit to an EUO is a condition that generally is enforceable. The court also found that plaintiff's deposition testimony did not substitute for the EUO because it served a different purpose. Finally, the court addressed whether plaintiff's refusal to submit to an EUO was wilful noncompliance, and noted she did not at the time give a reason for refusing, and since then she gave as her only reason her belief the case was closed when State Farm denied her claim in May. The court dismissed plaintiff's claim against State Farm without prejudice because it was "conflicted" on the issue.

State Farm moved for reconsideration, asking the court to either dismiss it with prejudice or to change its dismissal of Lessard to being without prejudice, arguing that the court's ruling allowed plaintiff to refile against State Farm but precluded State Farm from asserting Lessard's vehicle was not stolen. Under *Thomson v State Farm Ins Co*, 232 Mich App 38, 45; 592 NW2d 82 (1999), when an insured has refused to submit to an EUO, she has acted with wilful noncompliance and the insurer is entitled to dismissal with prejudice.

The trial court agreed, granting the motion for reconsideration and ordering summary disposition with prejudice in State Farm's favor.

In this Court, plaintiff argues first that the trial court should not have granted Lessard's motion for summary disposition because there is a question of fact regarding whether her vehicle was stolen. We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base

[1] The statute provides that the owner of a motor vehicle is not liable for injuries resulting from the negligent operation of the vehicle "unless the motor vehicle is being driven with his or her express or implied consent or knowledge." MCL 257.401(1).

his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Lessard supported her motion for summary disposition with three documents: plaintiff's own complaint, in which she alleged Lessard's vehicle was stolen; Lessard's unequivocal affidavit, stating the vehicle had been stolen; and the letter from Bristol West to State Farm, restating its position that the vehicle was stolen. Plaintiff provided no facts in response to Lessard's evidence and thus did not meet her burden of showing a question of material fact.

We next address whether the trial court erred in granting State Farm's motion for summary disposition, ultimately dismissing the suit with prejudice. The trial court's grant of summary disposition is reviewed de novo. *Spiek*, 456 Mich at 337. Issues of contract interpretation are questions of law, also reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). The trial court's findings of fact are reviewed for clear error. MCR 2.613(C); *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). Findings of fact are deemed clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*. at 329-330. A trial court's decision to grant or deny a motion for reconsideration is reviewed for abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

We find the trial court correctly granted State Farm's motion. The policy unambiguously requires the insured to submit to an EUO at State Farm's request, and states that legal action may not be brought against State Farm until the insured fully complies with the policy's provisions. State Farm requested that plaintiff and her mother submit to EUOs, and they refused to do so. Thereafter, plaintiff filed her suit. Case law holds that when an insured does not permit oral examination when required to do so, recovery under the policy is barred. *Yeo v State Farm Ins Co*, 219 Mich App 254; 555 NW2d 893 (1996); *Thomson*, 232 Mich App at 44-45.

The trial court's factual finding that plaintiff acted wilfully was not clearly erroneous and is supported by the record, especially the inferences that can be drawn from her having made a false police report. Moreover, the false report could be seen as part of a pattern of noncooperation by plaintiff. Under *Thomson*, the trial court was compelled to dismiss State Farm with prejudice. The *Thomson* Court noted that *Yeo* did not address the issue of wilful noncompliance. 232 Mich App at 45, and provided a working definition:

> "[W]ilful noncompliance" in the context at hand refers to a failure or refusal to submit to an EUO or otherwise cooperate with an insurer in regard to contractual provisions allowing an insurer to investigate a claim that is part of a deliberate effort to withhold material information or a pattern of noncooperation with the insurer. [*Id*. at 50-51.]

Given the trial court's finding that plaintiff acted wilfully, there was only one legally

permissible outcome to State Farm's motion, i.e., grant dismissal with prejudice.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Alton T. Davis